SBB SECURITIES SDN BHD A

v.

CHAN KWAN FOONG

COURT OF APPEAL, PUTRAJAYA B
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: A-02-2737-2010]
6 NOVEMBER 2012 C

EVIDENCE: *Adverse inference - Failure to call witness - Stockbroking firm's claim for contra losses against client - Whether shares purchased on instruction of client to remisier - Whether remisier in best position to enlighten court - Whether failure to call remisier attracted adverse inference - Evidence Act 1950, s. 114(g)* D

SECURITIES: *Remisier - Status and authority of remisier - Stockbroking firm's claim for contra losses against client - Whether shares purchased on instruction of client to remisier - Whether instruction given orally or in writing - Whether remisier called to testify - Whether documents for request of change of credit limit made and signed by remisier - Whether client aware of change of credit limit* E

SECURITIES: *Shares - Trading account - Claim for contra losses - Stockbroking firm's claim for contra losses against client - Whether shares purchased on instruction or order of client - Whether instruction given orally or in writing - Whether remisier called to testify - Whether purchase of shares within client's credit limit* F

The defendant/respondent had a trading account with the plaintiff/ G
appellant, a stockbroking firm, to enable the respondent to trade in securities at the facilities provided by Bursa Malaysia. The appellant alleged that on or about 27 October 1997, the appellant had bought 50,000 units of Pancaran Ikrab Bhd shares on behalf of the respondent for which the respondent had failed to pay on H
the due date. Hence, the appellant had to force-sell the shares and incurred contra losses of RM524,021.07. However, the respondent had failed to make the payment of the said contra-losses. The appellant therefore initiated an action against the respondent in the High Court claiming for the contra-losses I
incurred. The learned High Court Judge dismissed the appellant's

A claim and hence, this appeal. The respondent did not dispute that she had opened an account for trading in securities with the appellant's firm. However, she strongly denied that she had given any instruction or authority to the appellant or the remisier to buy the 50,000 shares, especially when the said purchase was done
B exceeding her credit limit of RM100,000. She had also denied to having made any request to increase the credit limit and thus did not know how and why her credit limit was increased to RM800,000. The respondent further contended that she did not receive the requisite contract notes and the contra statements and
C hence, was not in a position to dispute or complain about the claim.

Held (dismissing appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

D **(1)** Opening up of an account with the appellant was only to facilitate trading, particularly on the issue of payments and delivery of shares involved in the transactions. It did not amount to giving order or instruction to buy or sell any particular securities at any given time. Therefore, in order to
E bind the respondent as a client on any specific purchase or sale securities, the appellant must establish by reliable evidence that the respondent had made an order or instruction either to buy or sell securities personally or through any authorised third party orally or in writing in respect of the transactions in
F question. (paras 11 & 13)

(2) It was the burden of the appellant to tender all the relevant documents and to call the remisier to testify during trial. In the present case, there was no evidence of any writing or
G document produced by the appellant to show that the respondent had made such an order or instruction in the written form. The remisier, who would be in the best position to enlighten the court as to whether the respondent had made an order or instruction orally, had also not been subpoenaed
H to testify in court. The failure by the appellant to do so would attract the adverse inference under s. 114(g) of the Evidence Act 1950. (paras 14 & 18)

(3) The issue as to credit limit was irrelevant in establishing the
I appellant's claim against the respondent. What was more relevant was whether the respondent as a client had given the

order or instruction to the remisier, to purchase the 50,000 shares. On the ground of the failure to call the remisier to testify, the strong denial by the respondent and non-production of documents or any other records, the appellant had failed to prove that the purchase of the shares was made on the instruction or order of the respondent, the most important element of its claim. (para 21)

(4) All the documents relating to "request for change of credit limit" were made and signed by the remisier. On the face of the documents, they were purely internal documents from the remisier to the appellant's treasury department requesting for an increase of her credit limits in dealings with her clients. The appellant was in complete control of the documentation, to the total exclusion of the respondent. Therefore, the respondent should not be liable for the request and her credit limit would still remain at RM100,000. Any transaction which had exceeded the credit limit would clearly amount to unauthorised transaction and should not have been executed by the appellant. (paras 22 & 23)

(5) The appellant must produce some form of records such as posting register book in order to satisfy the court that the contract notes were in fact registered and posted to the respondent in view of the denial of receipt of the contract notes by the respondent. However, the appellant had failed to do so and in the circumstances, the respondent was not in a position to dispute or complain about anything contained in the contract notes in question. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Defendan/responden mempunyai akaun perdagangan dengan plaintif/perayu, sebuah firma broker saham, untuk membolehkan responden berniaga dalam sekuriti di kemudahan yang diperuntukkan oleh Bursa Malaysia. Perayu mendakwa bahawa pada atau sekitar 27 Oktober 1997, perayu telah membeli 50,000 unit saham Pancaran Ikrab Bhd bagi pihak responden yang mana responden gagal membuat bayaran pada tarikh akhir. Maka, perayu terpaksa menjual paksa saham-saham tersebut dan mengalami kerugian kontra sebanyak RM524,021.07. Walau bagaimanapun, responden telah gagal membuat bayaran kerugian

kontra tersebut. Perayu, oleh itu, memulakan tindakan terhadap responden di Mahkamah Tinggi dengan menuntut kerugian kontra yang dialami. Yang arif Hakim Mahkamah Tinggi telah menolak tuntutan perayu dan oleh itu, rayuan ini. Responden tidak mempertikaikan bahawa dia telah membuka akaun bagi berdagang dalam sekuriti dengan firma perayu. Tetapi, dia menafikan sekeras-kerasnya bahawa dia telah memberikan apa-apa arahan atau kuasa kepada perayu atau remisier untuk membeli 50,000 saham tersebut khususnya apabila pembelian tersebut dibuat melebihi had kreditnya sebanyak RM100,000. Dia juga menafikan membuat permohonan untuk menaikkan had kreditnya dan dengan itu, tidak mengetahui bagaimana dan mengapa had kreditnya dinaikkan kepada RM800,000. Responden selanjutnya menghujah bahawa dia tidak menerima nota-nota kontrak yang diperlukan dan penyata kontra dan dengan itu, tidak berada dalam kedudukan untuk mempertikaikan atau mengadu mengenai tuntutan tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Membuka akaun dengan perayu hanyalah untuk memudahkan perdagangan, khususnya atas isu-isu bayaran dan penyerahan saham-saham yang terlibat dalam transaksi. Ia tidak bermaksud memberikan perintah atau arahan untuk membeli atau menjual mana-mana sekuriti khusus pada bila-bila masa. Oleh itu, untuk mengikat responden sebagai pelanggan atau mana-mana pembelian atau penjualan sekuriti yang spesifik, perayu mesti membuktikan melalui keterangan yang boleh dipercayai bahawa responden telah memberikan satu perintah atau arahan untuk membeli atau menjual sekuriti secara peribadi atau melalui mana-mana pihak ketiga yang diberi kuasa secara lisan atau bertulis berkaitan dengan transaksi yang dipersoalkan tersebut.

(2) Adalah beban perayu untuk mengemukakan kesemua dokumen-dokumen yang relevan dan untuk memanggil remisier untuk memberi keterangan semasa perbicaraan. Dalam kes ini, tiada keterangan dalam tulisan atau dokumen yang dikemukakan oleh perayu untuk menunjukkan bahawa responden telah memberikan perintah atau arahan tersebut dalam bentuk tulisan. Remisier tersebut, yang sepatutnya mempunyai kedudukan yang paling baik untuk menjelaskan kepada mahkamah sama ada responden telah memberikan perintah

atau arahan secara lisan, juga tidak disepina untuk memberikan keterangan di mahkamah. Kegagalan oleh perayu untuk berbuat demikian menarik anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950.

(3) Isu berkaitan had kredit tidak begitu relevan dalam membuktikan tuntutan perayu terhadap responden. Apa yang lebih relevan adalah sama ada responden sebagai pelanggan telah memberikan perintah atau arahan kepada remisier, untuk membeli 50,000 saham tersebut. Atas alasan kegagalan memanggil remisier untuk memberi keterangan, penafian keras oleh responden dan kegagalan mengemukakan dokumen-dokumen dan rekod-rekod lain, perayu telah gagal membuktikan bahawa pembelian saham-saham tersebut dibuat atas arahan atau perintah responden, unsur yang paling penting dalam tuntutannya.

(4) Kesemua dokumen berkaitan dengan "permohonan untuk menukar had kredit" adalah dibuat dan ditandatangani oleh remisier tersebut. Jelas daripada dokumen bahawa ia adalah semata-mata dokumen-dokumen dalaman daripada remisier kepada jabatan kewangan perayu memohon kenaikan had kreditnya dalam urusan dengan pelanggan-pelanggannya. Perayu mempunyai kawalan penuh berkaitan dengan dokumen-dokumen, dengan responden tidak langsung terlibat. Oleh demikian, responden tidak sewajarnya bertanggungjawab bagi permohonan tersebut dan had kreditnya kekal sebanyak RM100,000. Apa-apa transaksi yang melebihi had kredit tersebut jelas bermaksud transaksi yang tidak diberikuasa dan tidak sepatutnya dilaksanakan oleh perayu.

(5) Perayu sepatutnya mengemukakan beberapa bentuk rekod seperti buku pendaftaran pengeposan untuk memuaskan mahkamah bahawa nota-nota kontrak tersebut sememangnya telah didaftarkan dan diposkan kepada responden memandangkan kepada penafian penerimaan nota-nota kontrak tersebut oleh responden. Walau bagaimanapun, perayu telah gagal berbuat demikian dan dalam keadaan tersebut, responden tidak boleh mempertikaikan atau membuat apa-apa aduan berkaitan dengan nota kontrak yang dipersoalkan.

A **Case(s) referred to:**
Azman Mahmood & Anor v. SJ Securities Sdn Bhd [2012] 6 CLJ 573 FC ***(refd)***
Yoong Sze Fatt v. Pengkalan Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

B **Legislation referred to:**
Evidence Act 1950, s. 114(g)

For the appellant - Babu Raj Raja Gopal; M/s Kean Chye & Sivalingam
For the respondent - V Selvaratnam; M/s V Selva & Assocs

C *[Appeal from High Court, Ipoh; Civil Suit No: 22-190-1998]*

Reported by S Barathi

D

JUDGMENT

Ramly Ali JCA:

The Appeal

E **[1]** This is an appeal by SBB Securities Sdn Bhd ('the appellant') against the decision of the learned High Court Judge dated 19 August 2010 dismissing its claim against the respondent. In this suit, the appellant (as the plaintiff at the court below) is claiming for contra-losses incurred for the purchase of
F Pancaran Ikrab Berhad shares allegedly made by the respondent on 27 October 1997. The total claim (as at 5 March 1998) was for RM542,498.20. The learned High Court Judge, after full trial, dismissed the appellant's claim. Hence the present appeal before us.

G

Appellant/Plaintiff's Case

[2] The appellant/plaintiff, at all material times, was a stockbroking firm, carrying on business as a stockbroker and dealer
H in securities. It is a member of the stock exchange - Bursa Malaysia. At the material times, the respondent/defendant was the appellant's client who had opened trading account with the appellant to enable the respondent to trade, (buy and sell) in securities at the facilities provided by Bursa Malaysia.

I

[3] The appellant alleged that on or about 27 October 1997, the appellant had bought on behalf of the respondent, 50,000 units of Pancaran Ikrab shares. The appellant alleged that the respondent had failed to pay the amount due for the said shares on the due date. As a result the appellant had no other alternative but to force-sell those shares on 17 November 1997. As a result of the forced sale, the appellant incurred contra-losses of RM524,021.07. The appellant contended the relevant contract notes were sent to the respondent on the following trading date. The respondent had failed to make payment for the said contra-losses. As at 5 March 1998, together with the element of interest at 13% p.a., the total amount claimed by the appellant was RM542,498.20.

[4] The appellant claimed that the respondent had opened a trading account with the appellant since 25 August 1994 based on the account opening form. At all material time, one Ms Elaine Lee was the remisier handling the respondent's dealing in securities with the appellant's firm.

[5] The appellant claimed that the relevant contract notes as well as the contra statements were sent to the respondent at her given address (as in the account opening form) at No. 41, Persiaran Greenhill, 30450 Ipoh, Perak. The Respondent had failed to respond or raise any dispute or complaint on those contract notes and the set-off statements.

[6] The respondent failed to settle the outstanding sum. The appellant then initiated a civil action at the Ipoh High Court against the respondent for the said sum.

Respondent/Defendant's Case

[7] The respondent (as the defendant at the court below) did not dispute that she had opened an account for trading in securities with the appellant's firm. However, she strongly denied that she had given any instruction or authority to the appellant or the remisier (Ms Elaine Lee) to buy the said 50,000 Pancaran Ikrab shares as alleged by the appellant, especially when the said purchase was done exceeding her credit limit of RM100,000 with the appellant. She did not know how and why her credit limit, according to the appellant's record, was increased to RM800,000. She denied having made any request to increase the credit limit.

[8] The respondent claimed that she did not receive the requisite contract notes and the contra statements. As such she was not in a position to dispute or complain about the claim made against her based on the said contract notes and statements. Therefore the respondent contended that she was not liable for the contra-losses as claimed by the appellant against her.

Our Findings

[9] It must be noted that in making any order or instruction either to buy or to sell securities listed on the Bursa Saham, a client (the respondent in the present case) only deals with the remisier. The order or the instruction is given either in writing or orally (sometimes by way of a phone call). It is a standard practice of any stockbroking firm in handling an order or instruction made by client to first record the client's instruction or order on a manual 'business done' slip by the remisier which is then passed on to the firm's backroom staff who would then key into the system the confirmation of the order or instruction (see: *Yoong Sze Fatt v. Pengkalan Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805) Court of Appeal's decision). If the order or instruction is confirmed, and the transaction is 'done', the stockbroking firm would issue contract note to the client identifying the details of the transaction as well as the price involved. The respondent's only contact in making an order or instruction in dealing with securities is through the remisier.

[10] In order to facilitate trading in securities with the appellant (through the remisier or dealer's representative of the appellant), the respondent as a client must open up a trading account with the appellant. In the present case, the said trading account for the respondent was approved by the appellant on 25 August 1994 (see: pp. 179-180 of the Appeal Records). The material terms and conditions of the trading account agreement, *inter alia*, are to the following effect:

> The Applicant (the Respondent) hereby undertakes:
>
> (a) to pay to SBB Securities any deposit on purchasing contracts if required and to make immediate payment against delivery of stocks and/or shares purchased on the Applicant's behalf;

(b) to promptly deliver to SBB Securities any stocks and/or shares for any sale contracts made on the applicant's behalf and hereby authorises SBB Securities to offset the said sale proceeds against any outstanding balance on the Applicant's account;

(c) to indemnity SBB Securities against all losses and expenses incurred resulting from any 'buying-in' or 'selling-out' executed on the applicant's behalf if the applicant fails to comply with his/her duties and obligations including cls. 1.2 (a) and (b) above; and

(d) to pay to SBB Securities all relevant fees, stamp duties, commissions and charges relating to the transactions including legal fees incurred by the Applicant on a solicitor and client basis in the enforcement of any of the Applicant's obligations and liabilities.

[11] Opening up of an account with the appellant is only to facilitate trading, particularly on the issue of payments and delivery of shares involved in the transactions. It does not amount to giving order or instruction to buy or to sell any particular securities at any given time. In short, opening up of an account with the appellant, by itself alone, is insufficient to prove that the client ('the respondent') had actually given specific order or instruction to buy or to sell any particular securities, (in the present case, Pancaran Ikrab shares). An agreement to open up an account for trading is different from an instruction or order to buy or to sell any particular securities at any given time.

[12] Item 4 of the terms and conditions relating to the application to open up the trading account, provides that:

> SBB Securities (the Appellant) does not bear any responsibility whatsoever for the Applicants' instructions to SBB Securities for the purchase or sale of securities as such instructions are deemed to have been made by the Applicant independently.

Item 4 above clearly indicates that instruction to buy or to sell securities is to be made 'independently' and not to be covered by the said terms and conditions.

[13] Therefore, in order to bind the respondent as a client on any specific purchase or sale of securities, the appellant, as the stockbroking firm, must establish by reliable evidence that the

respondent had made an order or instruction either to buy or sell securities either personally or through any authorised third party either orally or in writing in respect of the transactions in question.

[14] In practice, all orders or instructions for the stockbroking firm to trade for a client are placed through the remisier. If the order or instruction was given in writing, then evidence of such writing must be adduced before the court. In the present case, there is no evidence of any writing or document produced by the appellant to show that the respondent had made such an order or instruction in a written form. If the alleged order or instruction was given orally either in person or through the phone, then the oral evidence of the witnesses (in this case, the respondent as a client and the remisier as the person who accepted and executed the order or instruction) must be adduced. The respondent had given oral evidence in court during trial denying any form of order or instruction made by her or authorised by her in respect of the purchase of the said shares in question. Then, on the balance of probabilities, the burden is now on the appellant to adduce evidence to rebut the respondent's assertion that she never at anytime gave any order or instruction to purchase the said Pancaran Ikrab shares. The only other person who may testify on the matter is the remisier herself. She would be in a best position to enlighten the court as to whether the respondent did make an order or instruction on the matter, as the alleged order or instruction, if at all has been made, must have been made to the remisier.

[15] It is only appropriate, in the circumstances of the case, for the remisier to be called as a witness by the appellant. Failure on the part of the appellant to call the remisier as its witness would entitle the court to draw an adverse inference against the appellant's case under s. 114(g) of the Evidence Act 1950: ie, the evidence of the remisier, if produced in court would be unfavourable to the appellant.

[16] Under cl. 7(e), of the remisier agreement entered into between the remisier and the appellant, the remisier shall at all times keep or cause to be kept in a proper register all mandates or instructions relating to contracts executed by the remisier for the clients. The recording of such mandates or instructions by the remisier shall be in a format approved by the appellant and shall be updated in accordance with the requirements of the appellant.

[17] Under cl. 7(f) the remisier shall at all times observe and conform to the appellant's Dealing Rules and Code of Conduct; all rules and regulations and customs affecting the business of the appellant and shall also comply with all directives of the appellant which may be changed or amended from time to time. As provided under cl. 7(j) the remisier shall upon termination of the said agreement immediately deliver up to the appellant all correspondence, documents, papers and property belonging to the appellant or his clients which may be in his possession or under his control.

[18] The above provisions clearly indicate that the appellant through the remisier has all the necessary documents, including any mandates or instructions given by a client to the remisier in conducting their business of dealing in securities. That being the case, it is the burden of the appellant, as the stockbroking firm, to tender all those relevant documents and to call the remisier to testify during trial. If the appellant fail to do so, an adverse inference under s. 114(g) of the Evidence Act 1950 must be invoked against the appellant. The remisier had not been subpoenaed to testify in court, despite the respondent's vehement denial of giving instruction or order in respect of the purchase of the said shares. The respondent, in her evidence, claimed that the remisier's whereabouts in Ipoh is known to the appellant. This has not been challenged or denied by the appellant. That being the case, the court can reasonably infer that the evidence of the remisier, if produced in court, would be unfavourable to the appellant.

[19] One of the issues raised during trial is about the trading limit or credit limit granted to the respondent. The respondent claimed that her credit limit was RM100,000; and the two purchase transactions of 50,000 Pancaran Ikrab shares on a single day (27 October 1997) amounted to RM763,682.50, resulting in contra-losses of RM524,021.07. The respondent argued that she did not have the means (either in the form of securities or cash lodged with the appellant) to trade in such a large amount. The appellant on the other hand contended that the respondent's credit limit was increased to RM800,000 on her own request. The Respondent in her evidence denied such an allegation and further testified that the increase of the credit limit was done by the appellant itself without any request, consent or knowledge on her part.

[20] To prove the fact about the increase of the respondent's credit limit to RM800,000, the appellant tried to produce documents known as "Request for Change of Credit Limit" (ID-6A, ID-6B, ID-6C and ID-6D). All these documents are documents made by the remisier (alone) and were marked as "ID" because the maker (ie, the remisier - Ms Elaine Lee) was not called to testify in court. The appellant submitted that those documents (ID-6A-D) should have been admitted as evidence under s. 73A of the Evidence Act 1950.

[21] Our view is that the issue as to the credit limit is not so relevant in establishing the appellant's claim against the respondent. What is more relevant is whether the respondent as a client had given order or instruction to the remisier, to purchase the 50,000 shares of Pancaran Ikrab on the date in question. The remisier was not called to testify that the respondent had in fact made the order or instruction (or 'mandate' as used in cl. 7(e) of the remisier agreement). The respondent had strongly denied that she had ever made any order or given any instructions for the purchase of the said shares. No documents or any other records were produced by the appellant to support its contention. Therefore, on that ground alone it is sufficient to hold that the appellant had failed to prove the most important element of its claim against the respondent ie, that the purchase of the said shares was made on the instruction or order of the respondent. It is immaterial if the transaction, if carried out, had exceeded the credit limit of the respondent or not. Each transaction either to buy or to sell securities through a stockbroking firm must be based on an order or instruction or mandate by the client or any other authorised person on behalf of the client. The authorisation must have come from the client himself. The said transaction in question may be within the credit limit of the client, but still a client can only be held liable for the transaction made based on his order or instruction given to the remisier.

[22] In the present case, even assuming that the documents ID-6A-D are admitted as evidence or exhibits during trial, the contents of the documents speak for themselves. All the four documents relate to 'request for change of credit limit' made and signed by the remisier (Ms Elaine Lee) addressed to the credit/treasury department of the appellant. The opening sentence

in the documents appears to be "I would like to change the credit limit (s) of the following client (s) as follows". A few names were listed in the subsequent column, including the name of the respondent, as the "client name" followed by "client code" and "original credit limit" and "revised credit limit". It was signed by "signature of remisier". The bottom part of the page is "For Office Use" only, where the approval signatures appear.

[23] On the face of the documents they are purely internal documents from the remisier to the appellant's treasury department requesting for an increase of her credit limits in dealings with her clients. All the requests ID6A-D were made by the remisier, and were approved by the staff of the appellant. In other words, the appellant was in complete control of the documentation, to the total exclusion of the respondent. Therefore, the respondent as a client should not be liable for the request made *via* ID6A-D. That being the case, the respondent's credit limit would still remain at RM100,000 as claimed by her. Any transaction which had exceeded the said RM100,000 limit, would clearly amount to unauthorised transaction and should not have been executed by the appellant. The respondent should not be held liable.

[24] The appellant argued that it had tendered compelling evidence at the trial which drew irresistible inference that the respondent did make an order or instruction to purchase the said Pancaran Ikrab's shares. The compelling evidence being that:

(a) the sale and purchase contract notes were correctly addressed and posted to the respondent;

(b) the contra statements were correctly addressed and posted to the respondent; and

(c) the respondent's failure to complain or dispute the transaction after receiving the contract notes sent to him.

[25] All the relevant contract notes in respect of the transactions were tendered in court and marked as P7, P8 and P9 respectively. The notes state that any error therein must be notified to the appellant within stipulated time period ie, within 24 hours of the receipt. The appellant contended that the respondent had not

notified the appellant on any of the contract notes for any error therein. Hence, the appellant contended that since the respondent did not raise any complaint within the stipulated time, the respondent is deemed to have authorised or consented to the transactions; and therefore judgment should be recorded against the respondent.

[26] We are not in agreement with the appellant on this point. The respondent claimed that she did not receive the contract notes in question. That being the case, the appellant must establish by evidence that the contract notes were in fact prepared and posted to the respondent at the given address. Once they are posted ie, put in the ordinary process of posting to the respondent at the correct address, then the respondent is presumed to have received the contract notes. The presumption is a presumption of receipt, not a presumption of posting. The presumption only operates if the appellant had established that the contract notes were in fact posted to the respondent. In the present case, when the respondent had denied receipt of the notes the appellant must have called its officer or staff who had actually posted the contract notes to the respondent. Some form of records such as posting register book could have been produced in court by the officer concerned in order to satisfy the court that the contract notes were in fact registered and had been posted to the respondent. The appellant had failed to do that. As such, the presumption that the respondent had received the contract notes cannot stand.

[27] In the circumstances, the respondent was not in a position to dispute or complain anything contained in the contract notes in question. She cannot be faulted if she failed to do so. Therefore, the appellant's argument that the respondent had failed to complain on the transactions stated in the contract notes and therefore was bound by the amount claimed cannot hold water and must fail.

[28] The appellant as a stockbroking firm has all the means to establish or to prove its claim but has failed to do so. It has failed to produce all the relevant documents relating to the alleged transaction. It has also failed to call the remisier to rebut the evidence of the respondent that she never gave any order or

instruction to by the said shares in question. To conclude on this issue, we reproduce a passage by Raus Sharif PCA in the Federal Court decision in *Azman Mahmood & Anor v. SJ Securities Sdn Bhd* [2012] 6 CLJ 573; [2012] 6 MLJ 1 where at p. 16, His Lordship said:

> ... in order to satisfy its obligations, a brokerage firm must show not only that they had in place supervisory and compliance rules and procedure but also that they had effectively implemented and enforced their rules and procedures. Shifting the burden and imposing liability on the innocent trader by reason of unauthorized transactions conducted by their employees will cause substantial harm to the innocent trader.

Conclusion

[29] Based on the above considerations, we are satisfied that the appellant had failed to establish its claim on the balance of probabilities against the respondent. We therefore dismiss the appeal with costs of RM5,000 to the respondent and order that the deposit be refunded.